IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 265.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

THE POTTSVILLE BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

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OPINIONS BELOW

The United States Court of Appeals for the District of Columbia has rendered three opinions in this case. The first opinion (Record, pp. 1-4) was on the merits and is reported in 98 F. (2d) 288; the second opinion (R. 24-29) was on respondent's petition for writs of prohibition and mandamus against the Federal Communications Commission and is reported in 105 F. (2d) 36; and the third opinion (R. 33) was on the petitions filed by the Commission and by the Schuylkill Broadcasting Company, intervener, for rehearing but is not yet reported.

STATEMENT

The statement of facts submitted in the brief filed by the petitioner, hereafter frequently called the Commission, is substantially correct, and no further statement, as such, will be made herein. However, attention is called to respondent's opposition to the petition for writ of certiorari in the event a more concise, yet entirely adequate, statement of the facts is desired.

QUESTION PRESENTED

The question presented is not so simple as the statement of it appearing in petitioner's brief (p. 2). The question is: Inasmuch as the Court of Appeals dealt only with questions of law in its decision (R. 1-4) on the merits, and as the correctness of that decision is not in issue, did the Court possess power to protect its jurisdiction and enforce its judgment upon the refusal of the Commission to give it effect?

Stated differently: Where the Commission, under the guise of a new proceeding and in derogation of its own Rules of Practice, ignores the unchallenged decision of the Court of Appeals on matters of law committed to it for review under the Communications Act, is that Court powerless to enforce its judgment?

SUMMARY OF ARGUMENT.

Point 1. The procedural framework within which applications for construction permits are considered is such that, if a permit should be issued to the respondent, the facilities could not later be taken away by the Commission and given to another applicant without a hearing held for the purpose of determining whether such action would be proper. All the requirements of due process would be imposed and the new applicant would have the burden of proof.

Point 2. The applicant who, under the Commission's rules, becomes entitled to be heard first and who proceeds to meet the statutory requirements is entitled to a grant

without waiting for later applicants to be heard and considered. The Communications Act neither requires nor permits the Commission to delay consideration of an application on the vague supposition that a later application might, for some reason, provide better service. The Act knows only the criterion of public convenience, interest or necessity.

Point 3. The Commission may not oust the jurisdiction of the Court having statutory power of review by setting up, subsequent to the decision of the Court on questions of law, a new procedure involving a new record, other issues and other parties. It is bound by the Court's judgment and may not "intermeddle with it further than to settle so much as has been remanded."

Point 4. The United States Court of Appeals for the District of Columbia and other Federal Courts have power to issue all writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Furthermore, under the District Code the Court of Appeals has "power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." The Communications Act clearly designates as an appeal any proceeding on review in the Court of Appeals pertaining to the grant or refusal of permits or licenses for radio stations by the Commission.

Point 5. The Court of Appeals, having jurisdiction of questions of law on which the Commission is challenged, has the same power to issue mandamus to protect its jurisdiction in this case as it does in cases on appeal from the District Court. In directing that mandamus issue herein, the Court did not invade the administrative province of the Commission, but merely sought to compel the Commission to carry out the judgment of the Court and to prevent it from straying into another field. Mandamus is merely ancillary to that judgment.

Point 6. The respondent exhausted its administrative remedy before resorting to the Court below, and it has no plain, speedy and adequate remedy at law. When the appeal was filed with the Court below, the administrative remedy had been exhausted, and the Commission cannot alter this fact by attempting to embark on a new proceeding and pretending that thereby it affords an administrative remedy which respondent has not exhausted.

ARGUMENT

In order to avoid repetition, the respondent adopts the argument set forth in its Opposition (pp. 6-29) to the petition for writ of certiorari, and only such argument will be made here as appears to be necessary in order to refute new points raised by petitioner's brief.

Point 1. The Procedural Framework Within Which Applications for Construction Permits Are Considered is Such that, if a Permit Should Be Issued to the Respondent, the Facilities Could Not Later Be Taken Away by the Commission and Given to Another Applicant Without a Hearing Held for the Purpose of Determining Whether Such Action Would Be Proper.

The petitioner (Brief, p. 12) bases its primary argument upon an erroneous hypothesis arising from an apparent misstatement or misunderstanding of the "procedural framework in which applications for construction permits and broadcast licenses are considered." The petitioner states (Brief 16) that it must act upon every application filed and *must* "grant or deny as required by the statutory criteria, *even though a grant may require modification of its action on a previously considered application.*" This statement leads, whether it is intended to or not, to the inevitable conclusion that the Commission not only may, but is required to, take some or all of the facilities from an existing station if a later applicant be found to be *better* qualified but can-

not be issued an instrument of authorization without disturbing the assignment to the existing station. And this would be true regardless of the fact that the existing station was afforded no opportunity to defend itself.

The Commission states (Brief 19) that if it should grant the respondent's application before it considers the later-filed applications of the Schuylkill Broadcasting Company and the Pottsville News and Radio Corporation "it might very well be required at a later date, in consideration of the other two pending applications, to grant one of them notwithstanding that such a grant would preclude respondent from ever getting a station *license.*" This clearly indicates that, if it should grant respondent's application and issue a construction permit and, *during the construction of the station,* it should consider the two later applications and conclude that one appeared *better* qualified than respondent, the Commission would be required to grant the new application and thus preclude the respondent from ever obtaining a license to operate its constructed station!

After an applicant for radio facilities has been found duly qualified and an instrument of authorization issued to him because the proposed operation is found to be in the public interest, the matter of taking away any or all of those facilities and giving them to another party is not so simple a procedural process as petitioner's statement would indicate. In the first place, every application for a con-

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[1] A construction permit is only issued after the Commission has found that the operation of the proposed station will serve public interest, convenience and necessity. If the permittee proceeds to construct the station pursuant to the terms of the permit, there would appear to be no question but that the Commission is bound to issue the license to cover the permit unless it appears that false statements were originally made in the application, or in the hearing held thereon, which, had the truth been known at the time, would have resulted in a denial, rather than a grant, of the application, or unless it appears that circumstances have arisen since the grant to make the operation of the station *against* the public interest. See *Richmond Development Corporation* v. *Federal Radio Commission,* 35 F. (2d) 883.

struction permit requires the applicant to state whether or not he desires the facilities of any other station and, if he does so, to state specifically what those facilities are.[2] If he does not request the facilities of another station, but if his proposed operation would be inconsistent with that of an existing station, his application is designated for hearing and is considered in the light of the effect which it will have upon the operation of the existing station. Regardless of what the showing may be as to the merits of the new application, it is not a question of whether he can better serve the community, but merely whether the new applicant can do so without objectionable interference to the existing station. If he cannot, his application will be denied.

If the new applicant specifically requests the facilities of an existing station, the Commission will call upon that station to file an application for the renewal of its license,[3] even though the renewal would not normally be due for several months. When that application is received, the Commis-

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[2] The form supplied by the Commission for an application for a construction permit contains the following questions:

"20. (a) Does applicant request the assignment of all or any part of the facilities (i.e., frequency, power, and/or hours of operation) now assigned to any other station or stations .....
(Yes or No)

(b) If so, specify the station or stations and state accurately the facilities requested to be withdrawn therefrom ....."

[3] This practice is reflected in Section 1.362 of the Commission's Rules of Practice and Procedure:

"Sec. 1.362. *Filing directed by Commission.* Whenever the Commission regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation, and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified. If the licensee fails to file such application within the prescribed time, the hearing or investigation shall proceed as if such renewal application had been received."

sion will designate it for hearing to be held at the same time as the application for its facilities. The applicant for the facilities has the burden of proving that it will be in the public interest (1) to delete the existing station and (2) to establish his station.

The Schuylkill and Pottsville News applications request the same facilities as does the respondent's application and, being for the same place, all three are mutually exclusive. But the last two do not request the facilities of the respondent because the latter has not been assigned any facilities. The question of whether it would be in the public interest to take away facilities from the respondent is not in issue, and it was not in issue at the time the hearing was held upon the Schuylkill and Pottsville News applications.

If facilities be granted respondent, the question of whether they should be taken away can readily be brought in issue by any applicant who specifically seeks them. However, any such applicant would have the burden of proving that the respondent is not operating in the public interest and that the applicant would so operate, *not merely that the applicant is better qualified in some respect.* If the latter were true, every station, regardless of a fine record of public service and compliance with the statute and the regulations of the Commission, would be open to attack by any party who thought he had a *better* idea for the operation of the same facilities in the public interest. And the Commission, in the exercise of the practically unfettered discretion which a comparative consideration is claimed to afford, would be in a position to take from one and give to another as its fancy might dictate.

It is true that, if the respondent should receive a grant, the Commission might later endeavor to revoke it entirely or modify the terms thereof even though no party were seeking the facilities. However, such proceedings would be controlled by the provisions of Section 312 of the Communications Act, and the respondent would have full op-

portunity to be heard and defend itself.[4] But in a revocation proceeding the Commission has the burden of proof.

The Commission might also, conceivably, if the respondent should receive a grant, later seek to refuse to renew the license and thus eliminate the station. However, such proceedings would be controlled by the provisions of Sec-

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[4] Sec. 312 (47 U. S. C. § 312, 48 Stat. 1068) provides:

"(a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however*, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

"(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however*, That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

tion 309 (a) of the Communications Act, and the respondent would be afforded an opportunity to be heard.[5]

In brief, if the Commission should issue a permit to respondent, it could not later take away the facilities and give them to another without a hearing, held according to the requirements of due process, for the purpose of determining whether such action would be proper.

Point 2. The Applicant Who, Under the Commission's Rules, Becomes Entitled to Be Heard First and Who Proceeds to Meet the Statutory Requirements is Entitled to a Grant Without Waiting for Later Applicants to be Heard and Considered.

The petitioner proceeds upon the erroneous theory that it is required to grant the application which will *best* serve the public interest, and in order to do so it must wait and consider all applications regardless of when they may be filed, apparently on the assumption that the last applicant will be the best.

It is asserted by counsel for petitioner (Brief 46-47) that—

> " . . . Section 319 (a) very plainly requires that the Commission grant a construction permit to the best qualified applicant, not to the first to file his application with the Commission. The licensing provisions of the Act are designed to secure the best use of

[5] Sec. 309 (a) (47 U. S. C. § 309, 48 Stat. 1085) provides:

> "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

> the limited broadcasting facilities which are available and not to reward the victor in a race of diligence."

But Section 319 (a), which appears in full in petitioner's brief (p. 62), contains no such requirement. It merely provides, insofar as pertinent here, that no license shall be issued by the Commission unless a construction permit has first been granted, and that the Commission "may grant such permit if public convenience, interest, or necessity will be served by the construction of the station." That this power is not unlimited, as the contention of petitioner indicates, has been recognized by this Court in *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Company*, 289 U. S. 266, 285:

> "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. . . . "

No one will contend that an applicant who is *not* qualified should be granted a license merely because he is the first. But if an applicant is in every way qualified and has attained priority of hearing and decision under the Commission's rules of procedure so that his application may be granted before any other could qualify under due process of law, it cannot be supposed that it was in contemplation of the statute that service to the public should be delayed on a vague supposition that a later applicant might serve better or best. And it cannot be concluded that the Commission has discretion, in derogation of its Rules of Practice, to indulge such a supposition whenever and as often as it may choose, thereby indefinitely delaying essential service to the public. There must be some limitation on the exercise of arbitrary discretion. The Communications Act itself recognizes this fact in Section 307 (a) which provides that—

> "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limita-

tions of this chapter, *shall grant* to any applicant therefor a station license provided for by this chapter." (Emphasis supplied.)

The mandatory nature of this provision was noted by the Court below in *Courier Post Publishing Company* v. *Commission*, 104 F. (2d) 213, 218:

> " . . . The permit should be granted if it meets the statutory criterion of public convenience, interest or necessity, if not, it should be denied. . . . "

Similarly, in *Heitmeyer* v. *Commission*, 95 F. (2d) 91, 100, the Court below stated:

> "The discretion which the Commission is directed to exercise is not absolute. The purpose of the statute is to secure to the people of the several states and communities a fair, efficient and equitable distribution of radio service. The Commission is directed by the Statute to apply this standard in considering applications for licenses 'when and insofar as there is demand for the same' [Sec. 307 (b)]; and, 'if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license . . . ' [Sec. 307 (a)]."

Even the Commission recognized a limitation upon its discretion by the promulgation of Rule 106.4,[8] which itself precluded consideration, on a comparative basis, of conflicting applications filed after the first application had been designated for hearing, as in the case at bar. This rule clearly contemplates, and sensibly so in conformity

[8] Commission Rule 106.4 provides:

> "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, *excepting, however, applications filed after any such application has been designated for hearing.*" (Emphasis supplied.)

with the provisions of the statute, that the applicant who is thereunder entitled to be heard first is also entitled to a grant if he meets the statutory criterion of public convenience, interest, or necessity. Having duly promulgated such a rule it is elemental that the Commission may not depart therefrom to suit its fancy. Nevertheless, it claims (Brief 16) that it may require different procedures in different cases, according as it may be impressed with "varying considerations". Acceptance of that view would make the administration of the Act so variable as to negative the possibility of applying any rule of law and would substantially vitiate the right of review. The adoption by the Commission of rules of practice is responsive to the requirements of the Act and it is necessary that these rules be followed not only that there may be orderly procedure and a "proper dispatch of business" but in order that the requirements of due process of law shall be complied with.

In *Rio Grande Irrigation & Colonization Co.* v. *Gildersleeve*, 174 U. S. 603, 609, the Court referred with approval to the following statement in *Thompson* v. *Hatch*, 3 Pick. 512:

> "A duly authorized rule of Court has the force of law, and is binding upon the Court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

And in *Weil* v. *Neary*, 278 U. S. 161, 169, the doctrine is reaffirmed and reference is made to other cases to the same effect.

If the Commission were charged with the nebulous duty of selecting the "best" qualified applicant, this would open a wide field for speculation and doubt. It could not decide until it has heard all possible applicants, actual and poten-

tial. There might always be another and still another applicant moving up to demand that he be heard before a final decision—and any one of these might be the "best". Infinite possibilities of hair-splitting and favoritism could be envisioned. And even assuming that the Commission would always be actuated by the highest motives and the strongest desire to serve the public interest, there might ensue incalculable delay in making available radio facilities. The Act nowhere imposes upon the Commission any such impossible ideal of perfection. If the applicant be qualified according to the common sense requirements set forth in Sections 307 (a) and 319 (a) the Commission must issue the instrument of authorization.

Neither Section 307 (a) nor 319 (a) use the word "best", but there is another provision of the Act which clearly indicates that Congress had in mind the element of time as a factor in determining what is best in the public interest. Section 4 (j) provides:

> "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

Presumably in response to this injunction of the statute the Commission adopted its rules of practice, and particularly aforesaid Rule 106.4 which, as applied by the Commission, barred a belated application from contemporaneous consideration with the first application. The Court of Appeals has considered this rule on various occasions, the most significant observation being contained in its decision in the case of *Colonial Broadcasters, Inc.* v. *Federal Communications Commission*, 105 F. (2d) 781, 783:

> "We have had occasion to notice the rule and approve it as in all respects consistent with the provisions of the Act, and we think its language is sufficiently clear to leave no room for interpretation. Generally speaking, in the respects with which we are concerned here, it means no more than that where two applications are filed for the same facilities and neither has

been designated for hearing, the applications will be consolidated and heard together; but where, by reason of previous filing, one of the applications has been designated for hearing, the applications will be heard in turn and not necessarily on a comparative basis. We are unable to see anything unfair in this provision of the rule. It seems to us to be logical, reasonable, and fair, as well as to promote orderly procedure. Nor do we think there is any inconsistency in adhering to the rule and yet permitting the later applicant to intervene in the proceedings on the first application to show proper cause, if he can, why it should not be granted. . . ."

It is to be observed that the rule does not give an absolute right to contemporaneous hearing of "conflicting claims". The exception, however, is absolute in cutting off from such contemporaneous consideration "applications filed after any such application has been designated for hearing." As to such belated applications, the Commission announces positively that it will make no "endeavor" to fix the same date for hearing.

Respondent's application was designated for hearing five weeks before the first of the two other applications was filed and it had been filed six weeks before it was designated. If the exception to Rule 106.4 had been waived in behalf of the first of the belated applications, it would have been arbitrary to refuse to waive it in behalf of the second one which was filed nearly seven months after respondent's application. Thus an endless chain of belated applications would be entitled to be heard, thereby postponing the first until the last had caught up, and indefinitely delaying service to the public. Can it be said that this would "best conduce to the proper dispatch of business and to the ends of justice"?

Under the well-recognized rules of procedure having the force and effect of law, and as required by due process, the Commission heard and reached a final determination in this case upon "a full statement in writing of the facts and grounds for its decision as found and given by it", in ac-

cordance with the requirements of Section 402 (c) of the Communications Act and as required by numerous decisions of this Court. *Florida* v. *U. S.*, 282 U. S. 194, 215, citing *Beaumont, S. L. & W. R. Co.* v. *U. S.*, 282 U. S. 74; also concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38. In its decision, the Commission made findings of fact which were sufficient in every way to form a basis for the conclusion that a granting of the permit would serve public convenience, interest, or necessity. But the Commission denied the application because of error in respect of two questions of law. The Court below, having statutory power of review, so held, but out of an abundance of caution sent the case back to the Commission for reconsideration on one of those questions. Using that remand of the case as an excuse, the Commission now claims that it is necessary to conduct a hearing outside the record submitted to the Court and to consider other applications on a comparative basis. This, if permitted, would mean a complete abrogation of the rule promulgated by the Commission for the proper dispatch of business and necessarily would result in endless delay in providing radio facilities for the public.

The petitioner asserts (Brief 16) that "many considerations which vary from case to case must affect the procedural question of whether to consider pending conflicting applications separately or simultaneously." Several such considerations are specified, one being "the amount of delay that will result from a simultaneous comparative consideration."

If the Commission had been influenced at all by this consideration to speed the respondent's application to prompt hearing and decision for the purpose of making radio facilities more promptly available to the public, as contemplated by the Communications Act, the earlier separate hearing and decision on this application would be understandable. But the whole course of this proceeding shows clearly that what was intended from the first was a denial. The flimsy

grounds ultimately assigned by the Commission for such denial sufficiently evidences that fact.

It is shown (Petitioner's brief, p. 17) that in May, 1937, when the Commission had before it respondent's application "on which a hearing had been held and argument heard by the Commission," the subsequently filed applications "were not at that time ready for final Commission action." It is thus apparent that there were no "pending conflicting applications" and the Commission in effect so conceded when it refused a specific request from the first of these applicants for simultaneous comparative hearing with respondent's application, thereby adhering to its established rule (106.4). Nevertheless, the Commission states (Brief 17): "Since it appeared to the Commission that respondent's application should be denied, it acted at that time to deny the application and did not delay action for possible comparative consideration with the Schuylkill and Pottsville News and Radio applications."

The fact is, as we have already shown, the Commission could not give comparative consideration to these other applications without doing violence to its established rule having the force and effect of law. That being so, how does the judgment of the Court below invalidating the grounds assigned for the denial of respondent's application invest the Commission with jurisdiction or power to do what it refused to do and could not lawfully do when it had control of the case?

Our position is that when an application is filed and set for hearing and another subsequently filed application is too late to be heard concurrently under the Commission's rule and the Commission proceeds to a determination of the first application but bases its denial thereof on capricious and arbitrary grounds, the application being sound and in full compliance with the statute, the Commission cannot then in derogation of the established rule advance other reserve battalions of applications under the pretext that it is in search of the "best".

Point 3. The Commission May Not Oust the Jurisdiction of the Court Having Statutory Power of Review by Setting up, Subsequent to the Decision of the Court on Questions of Law, a New Procedure Involving a New Record, Other Issues and Other Parties.

The fundamental error which permeates the argument advanced by opposing counsel is the conception that, after the reviewing authority has taken jurisdiction, the Commission may deal with the case precisely as though nothing had supervened and that thereafter it may adopt whatever procedure it may choose in derogation of its own rules of procedure as applied by itself and followed by the Court.

As shown in our "Opposition to Petition for Writ of Certiorari" (pp. 17-18), the authority of the Commission "ended with the filing in Court of the transcript of record" and the Court acquired "continued and exclusive jurisdiction". *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 368, 372. Thereafter, the Commission without leave of the appellate court had no authority "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer," but is bound by the judgment as the law of the case and "cannot vary it, or examine it for any other purpose than execution, or give any other or further relief; or review it even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded . . . " *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247.

Petitioner contends (Brief 46) that this doctrine as announced in the cited cases is dicta because in those cases "the mandate of the appellate court disposed of the entire case". However, the doctrine has been announced without qualification in cases cited in the *Sanford Fork & Tool Co.* case, running back to 1838, and has been affirmed in recent cases, such as *Delaware, L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1, and *Baltimore & Ohio R. Co.* v. *U. S.*, 279 U. S. 781. The doctrine was recognized, in effect, in the

Ford Motor Co. case and other recent cases, as shown in our "Opposition" (pp. 16-19). The earliest expression of the doctrine by this Court seems to have been in *Sibbald* v. *United States*, 12 Pet. 488, 492, wherein reference is made to the same doctrine applied in the House of Lords (3 Dow. P. C. 157).

We confess that we have been unable to find the doctrine of strict compliance announced in any case where disobedience of the judgment of an appellate court has been so obviously attributable to contumacy. As stated in *Barber Asphalt Paving Co.* v. *Morris*, 132 F. 945, 954, "few, indeed, are the cases in which appellate jurisdiction is disregarded after the right to it has been actually exercised."

Here the judgment of the Court below in the first instance disposed of the entire case on the questions of law essential to its disposition. To borrow language used in the opinion of this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 136, the Court below found the Commission "to have proceeded on erroneous legal principles" and ordered it "to proceed within the framework of its own discretionary authority on the indicated correct principles."

The Court below conceded (R. 4) that the rule or policy to be prescribed or announced "on the question of the propriety of confining grants of a local nature to local people" was a matter "left wholly in the hands of the Commission" under the statute.[7] It reversed the Commission

[7] This was the secondary reason for the denial of respondent's application, namely, that the applicant was controlled by a non-resident who was not shown to be personally familiar with the needs of the area to be served. The Commission expressed the opinion that "local" stations should be controlled by persons who are familiar with the needs of the area to be served. (The facilities requested by the applicant are in the "regional", not "local", category.) When the Court of Appeals reversed the Commission and remanded the case, it left open for further consideration by the Commission the *sole question* of whether the latter had adopted, or intended forthwith to adopt, as a definite policy the disqualification of corporate applicants which may be controlled by non-residents of

on the primary ground assigned for its denial of the application, *i.e.*, the Commission's erroneous view of the Pennsylvania Securities Act, and sent the case back for reconsideration on the secondary ground because the decision resting on that ground was in conflict with the Commission's decisions in all other cases, and was therefore to be regarded as arbitrary and capricious.

The Commission had fully performed and exercised its administrative duties when the case was before it. When the case reached the Court the latter acquired complete jurisdiction to decide the questions of law involved. Instead of announcing a final decision on one of these questions it sent it back to the Commission for reconsideration on the complete record submitted to the Court. There has never been any suggestion from the Commission that it desired to supplement that record; but without leave of the Court it arbitrarily sought to bring in another record with other issues and other parties, making an entirely new case.

If judicial review is to be other than a mockery, how can it be said that such a proceeding by the Commission is to be considered "within the framework of its own discretionary authority on the indicated correct principles"? And how can it be said that the doctrine announced by this Court in the long line of cases beginning with the *Sibbald* case in 1838 is to be regarded as dicta? The doctrine is founded in principles so essential to the proper administration of the law, and "to a reasonable termination of litigation" (*Re Potts*, 166 U. S. 263, 267) that it is not logical to assume that it does not apply in a case such as is presented here.

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the area to be served. (R. 4, 25, 28.) The Commission has never adopted any such policy. As a matter of fact, on November 24, 1939, it specifically held that a finding that a corporate applicant for a local station is controlled by non-residents who are not shown to be familiar with the needs of the area to be served would not alter the Commission's conclusion that the applicant is qualified and that public interest, convenience and necessity would be served by granting the application. (*Vincennes Newspapers, Inc.*, Docket No. 4087.)

Point 4. The United States Court of Appeals for the District of Columbia and Other Federal Courts Have Power to Issue All Writs "Which May Be Necessary for the Exercise of Their Respective Jurisdictions, and Agreeable to the Usages and Principles of Law."

Section 1, Article III, of the Constitution provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . "[8]

The Code of Law of the District of Columbia provides (Title 18, Sec. 1) that the judicial power of the District shall be vested in:

. . .

> "Second. Superior Courts, namely, the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia, and the Supreme Court of the United States . . . "

Section 33 of the District Code (Title 18) specifically provides:

> "The said Court of Appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction."

We do not need to depend entirely upon this express grant of power in aid of the appellate jurisdiction of the Court below nor the reason that mandamus is a writ in execution of the judgment of the Court already rendered (*Heine* v. *Board of Levee Commissioners*, 86 U. S. 223), and it has been repeatedly held that "Section 716, Rev. Stat. (Sec. 262 of the Judicial Code, U. S. C. Title 28, Sec. 377), provides that this Court and other federal courts

[8] The United States Court of Appeals for the District of Columbia is a constitutional court of the United States and capable of receiving judicial power under Article III. *O'Donoghue* v. *United States*, 289 U. S. 516.

'shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.' " *Ex Parte United States*, 287 U. S. 241, 246.

In the case just cited this Court said (287 U. S. 246):

> " . . . McClellan v. Carland, 217 U. S. 268, 280, 54 L. ed. 762, 766, 30 S. Ct. 501, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under Rev. Stat. Sec. 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.' See also Delaware, L. & W. R. Co. v. Rellstab, 276 U. S. 1, 5, 72 L. ed. 439, 441, 48 S. Ct. 203; Re Babcock (C. C. A. 7th) 26 F. (2d) 153, 155; Barber Asphalt Paving Co. v. Morris (C. C.) 67 L. R. A. 761, 66 C. C. A. 55, 132 Fed. 945, 952-956."

Nor is it necessary to answer petitioner's highly technical argument based on an analysis of *Kendall* v. *United States*, 12 Pet. 524, against the jurisdiction of the Court below to issue mandamus in this case on the ground that this is not an appeal but a case of original jurisdiction in respect of which no express authority has been granted the Court below to issue mandamus.

It is not even necessary to make the abstract argument suggested by language employed in the *Kendall* case, *supra*, p. 624, that it would "involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist."

It is only necessary to show that Sec. 402 (b) of the Communications Act is meticulously exact in designating as an "appeal" the proceeding on review in the Court of Ap-

peals pertaining to the granting or refusing of permits or licenses for radio stations by the Commission.

It will be observed that Sec. 402 (a) provides that—

> "The provisions of the Act of Oct. 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act."

Under the provisions of the said Act of October 22, 1913, (Sec. 41) "The district courts shall have original jurisdiction" of "orders" included within the provision above quoted. The "venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order . . . shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made," etc. (Sec. 43); and under Sec. 45a "communities, associations, corporations, firms, and individuals who are interested in the controversy or question" before the Commission may intervene in said suit or proceedings at any time after the institution thereof.

It is therefore apparent that the "orders" contemplated under paragraph (a) of Sec. 402 of the Communications Act are those coming within the class of administrative orders imposing general requirements or regulations, such as have been considered by this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, and *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232. In the *Rochester* case the effect of the order was to bring the Telephone Corporation under "previously formulated mandatory orders addressed generally to all carriers amenable to the

Commission's authority" (p. 144). In the *American Telephone & Telegraph Co.* case the order involved was one "prescribing a uniform system of accounts for telephone companies subject to the Communications Act of 1934." As stated by the Court (p. 237):

> "The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the Corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the Act that it may properly regulate such matters as are really within its jurisdiction."

It is readily apparent that these were strictly administrative orders as to which it was said in the case last cited (p. 236):

> "This Court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers."

Coming to consider the subject matter of Sec. 402 (b) we find entirely different language employed with an obvious intent to draw a distinct line of demarkation. Thus:

> "(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:
>
> "(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for a renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.
>
> "(2) By any person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.
>
> "(3) By any radio operator whose license has been suspended by the Commission."

These provisions deal, not with orders applying to a general class and involving strictly administrative functions by the Commission, but with "decisions" to be formulated after hearings in accordance with the requirements of due process of law because such "decisions" constitute a final determination by the Commission of the rights of parties directly affected. In reaching such "decisions" the Commission acts in a quasi-judicial capacity and its findings of fact and conclusions of law constitute a case or controversy. Therefore when such a case goes to the Court of Appeals it is "an appeal" not only by definition of the Act but it is so in practical effect.

We think it is entirely clear from what has been said that the power conferred upon the Court of Appeals by Section 33 of the District Code "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction" is ample, without more, to empower that Court to issue a writ of mandamus in this case.

Point 5. The Court of Appeals, Having Jurisdiction of Questions of Law on Which the Commission is Challenged, Has the Same Power to Issue Mandamus to Protect Its Jurisdiction in this Case as it Does in Cases on Appeal from the District Court.

The Court below stated (R. 27) that they had "no doubt that as far as is practicable the order of the court entered on an appeal from the Commission ought to have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding." (Citing *Sanford Fork & Tool Co., Petitioner; Re Potts;* and *D. L. & W. R. Co.* v. *Rellstab,* all *supra.*)

The Commission earnestly argues (Brief 44) that, "in entertaining a proceeding under Section 402, the position of the Court below is no way comparable to that when it hears an appeal from the District Court," and that "even if the writ of mandamus had been appropriate if issued to the District Court, the Court below was entirely without

warrant in its assumption that it possessed an analogous supervisory power over the administrative functions of the Commission."

This argument is based on the erroneous hypothesis that the Court below has asserted authority to supervise or direct the administrative functions of the Commission. As is elsewhere shown, the Court has scrupulously avoided any such thing.

The Commission had performed all necessary administrative functions before it rendered a decision in this case. It had taken evidence, made findings of fact, heard oral argument, and formally stated the grounds for its decision in writing, as required by law. That was the end of its administrative functions in this case. No question was raised as to the completeness of the record when the Court below acquired exclusive jurisdiction on appeal. It is conceded that the Court had jurisdiction to pass on the questions of law put in issue by that appeal. It is conceded also that the Commission had committed errors of law, and it is even insisted that the Commission intends to respect and carry out the judgment of the Court.

The point of departure is reached when we come to the procedure proposed by the Commission to comply with the Court's judgment. According to the decision of the Court upon the petition for writs of prohibition and mandamus, that proposed procedure was not such as might lawfully be followed in this case because it involved an entirely new case on another record with new parties and extraneous issues.

In order to prevent the defeat or impairment of its jurisdiction the Court signified its intention of issuing mandamus to compel the Commission to carry out the judgment by reconsidering the one question left open for its determination on the record made and which alone constituted the basis for the decision of the Court as well as that of the Commission. Obviously, if another record were to be imported a new case would be called into being.

It therefore seems perfectly clear that in doing what it did the Court did not invade the administrative province of the Commission incident to this case. It merely prevented the Commission from straying off into another field, thereby delaying the performance of the duty imposed upon it by the Act as properly construed by judicial authority.

Since the Court has no jurisdiction to pass on other than questions of law coming before it on a petition for review of the Commission's decision, and since it is conceded that the original decision of the Court did nothing more, the conclusion would seem to be irresistible that the Court was clothed with the identical authority and was as much in duty bound to protect its jurisdiction to see that its judgment should be carried into effect as though a decision of a lower court had been involved.

In the *Ford Motor Co.* case, which involved another administrative agency operating under an act as to which counsel concede (Brief 27) that the provisions governing review are substantially similar to those in the Communications Act, this Court held (305 U. S. 371) that the appellate court—

> "... was possessed of exclusive jurisdiction of the administrative proceeding 'and of the question determined therein,' and thus of the power of 'enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.'"

And further that—

> "... the Board, in the presence of the Court's continued and exclusive jurisdiction, remained without authority to deal with its order ..."

We are confronted with the argument (Brief 44), differentiating between the power to be exercised by the appellate court in reviewing decisions of a lower court and its power to review "the Commission's action in the performance of its executive or administrative function," that, as to the

former, "the appellate court acts on a record containing all the circumstances before the trial Court," whereas in reviewing Commission's action "it may be supposed not to have the expert assistance which must lie back of the Commission's decision on the many factors not presented to the Court; and, certainly in the case where a record involving only one of conflicting applications is before it, the Court has only a fragmentary part of the record which must ultimately guide the grant of one application."

But the Court is entitled to have *all* factors presented to it! The Communications Act, Sec. 402 (c), expressly provides:

> ". . . Within thirty days after the filing of said appeal the Commission shall file with the Court the originals or certified copies of *all papers or evidence* presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter, file a *full statement* in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal." (Emphasis supplied.)

Not only does the Act forbid Star Chamber proceedings but this Court has repeatedly held that the fundamental requirements of due process are violated when an administrative agency acts upon information or "factors" not properly introduced in evidence or without due notice to interested parties. In *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, this Court, in an opinion by Mr. Justice Brandeis dealing with an order of the Interstate Commerce Commission, said:

> ". . . The general notice that the Commission would rely upon the voluminous annual report is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

And in *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, the Court held:

> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. *And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat.* Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." (Emphasis supplied.)

The pretension that the Commission is entitled to decide cases on its peculiarly "expert" knowledge or "on the many factors not presented to the Court" makes especially apt the following expression of this Court in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38:

> ". . . Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. . . ."

Point 6. The Respondent Exhausted Its Administrative Remedy Before Resorting to the Court Below, and It Has No Plain, Speedy and Adequate Remedy at Law.

As already shown, the fundamental misconception indulged by opposing counsel is that the Commission may elect to treat the case when remanded just as if there had been no interruption or supersedure of its control and no requirement by the Court that reconsideration should be confined to the one question remanded without going outside the record already made. But for this misconception we are convinced that there would have been no citations such as *Federal Power Comm.* v. *Metropolitan Edison Co.*, 304 U. S. 375, and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. No final order had been made by the administrative agency in either of those cases. As this Court said in the *Metropolitan Edison Co.* case, "There was no order of the Commission before the Circuit Court of Appeals for review", hence "the Circuit Court of Appeals in the circumstances disclosed had no appellate jurisdiction to protect". As pointed out in that opinion:

> ". . . The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

This Court therefore reversed the decree of the Circuit Court of Appeals granting an injunction against the Commission's order providing for an inquiry and investigation. As one ground for such reversal it was observed that—

> "Attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration."

The instant case involves a very different question. Here, as is elsewhere shown, we are dealing with a *final* decision and order of the Communications Commission made on a complete record and with full findings of fact and a statement of the grounds for its decision. The administrative remedy had been exhausted when the petition for review was filed with the Court below and no question was raised then as to the jurisdiction of the Court to pass on the questions of law involved. The Court therefore acquired exclusive jurisdiction and reversed the Commission on the record made. Under the statute, that record is binding on Court and Commission. The Commission cannot alter that fact by attempting to embark on a new proceeding and pretending that thereby it affords an administrative remedy which respondent has not exhausted.

Manifestly, in such case the appeal provisions of the Communications Act afford no adequate remedy at law, for under the procedure contemplated by the Commission respondent might be required to appeal again and again until the Commission had exhausted reasons however frivolous for denying the application. Certainly any "final relief" to be secured by repeated appeals might be so far beyond the reach of the average applicant as to be no relief at all. Thus the very situation in which respondent now finds itself strikingly illustrates the need for the issuance of the writ of mandamus by the Court below. Without it the respondent has no remedy.

The Court has stated that the mere fact that there is a remedy at law is not enough; that remedy "must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce's Executors* v. *Grundy*, 5 Pet. 210, 215; *City of Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 12.

CONCLUSION.

The proceeding in the Court of Appeals upon the petition for writs of prohibition and mandamus was part and parcel of the case originally brought before the Court by the appeal. Issuance of the mandamus was ancillary to the original judgment, the correctness of which is not in issue, and mandamus was necessary for the protection of the jurisdiction of the Court and constituted merely a continuing exercise of jurisdiction which the Court possessed from the outset and never relinquished. Unless the action of the Court below in enforcing its original judgment is sustained, that judgment, now conceded to have been correct, will be rendered nugatory.

Respectfully submitted,

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January, 1940.

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SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1939.

Federal Communications Commission, Petitioner, *vs.* The Pottsville Broadcasting Company. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 29, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The court below issued a writ of mandamus against the Federal Communications Commission, and, because important issues of administrative law are involved, we brought the case here. 308 U. S. —. We are called upon to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of radio broadcasting in the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C. § 151.

Adequate appreciation of the facts presently to be summarized requires that they be set in their legislative framework. In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927, c. 169, 44 Stat. 1162, as amended, 46 Stat. 844. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry.[1] The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927.

Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might

[1] For the legislative history of the Act of 1927, see H. Rep. No. 464, S. Rep. No. 772, 69th Cong., 1st Sess.; 67 Cong. Rec. 5473-5504, 5555-86; 5645-47; 12335-59; 12480, 12497-12508, 12614-18; 68 Cong. Rec. 2556-80, 2750-51, 2869-82, 3025-39, 3117-34, 3257-62, 3329-36, 3569-71, 4109-53. A summary of the operation of previous regulatory laws may be found in Herring and Gross, Telecommunications, pp. 239-45.

be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. Communications Act of 1934, Title iii, § 307(d). No license was to be "construed to create any right, beyond the terms, conditions, and periods of the license." *Ibid.* § 301. In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, "public convenience, interest, or necessity" was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. *Ibid.*, Title I, § 4(j). Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of "public convenience, interest, or necessity." The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.[2]

[2] Since the beginning of regulation under the Act of 1927 comparative considerations have governed the application of standards of "public convenience, interest, or necessity" laid down by the law. " . . . the commission desires to point out that the test—'public interest, convenience, or necessity'—becomes a matter of a comparative and not an absolute standard when applied to broad-

Against this background the facts of the present case fall into proper perspective. In May, 1936, The Pottsville Broadcasting Company, respondent here, sought from the Commission a permit under § 319 *Ibid.*, Title iii, for the construction of a broadcasting station at Pottsville, Pennsylvania. The Commission denied this application on two grounds: (1) that the respondent was financially disqualified; and (2) that the applicant did not sufficiently represent local interests in the community which the proposed station was to serve. From this denial of its application respondent appealed to the court below. That tribunal withheld judgment on the second ground of the Commission's decision, for it did not deem this to have controlled the Commission's judgment. But, finding the Commission's conclusion regarding the respondent's lack of financial qualification to have been based on an erroneous understanding of Pennsylvania law, the Court of Appeals reversed the decision and ordered the "cause . . . remanded to the . . . Communications Commission for reconsideration in accordance with the views expressed." *Pottsville Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 288.

Following this remand, respondent petitioned the Commission to grant its original application. Instead of doing so, the Commission set for argument respondent's application along with two rival applications for the same facilities. The latter applications had been filed subsequently to that of respondent and hearings had been held on them by the Commission in a consolidated proceeding, but they were still undisposed of when the respondent's case returned to the Commission. With three applications for the same facilities thus before it, and the facts regarding each having theretofore been explored by appropriate procedure, the Commission directed that all three be set down for argument before it to determine which, "on a comparative basis" "in the judgment of the Commission will best serve public interest." At this stage of the proceedings, respondents sought and obtained from the Court of Appeals the writ

casting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser." Second Annual Report, Federal Radio Commission, 1928, pp. 169-70.

of mandamus now under review. That writ commanded the Commission to set aside its order designating respondent's application "for hearing on a comparative basis" with the other two, and "to hear and reconsider the application" of The Pottsville Broadcasting Company "on the basis of the record as originally made and in accordance with the opinions" of the Court of Appeals in the original review (98 F. (2d) 288), and in the mandamus proceedings. *Pottsville Broadcasting Co.* v. *Federal Communications Commission*, 105 F. (2d) 36.

The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. See *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 255-56. That proposition is indisputable, but it does not tell us which issues are laid at rest. Cf. *Sprague* v. *Ticonic Bank*, 307 U. S. 161. Nor is a court's interpretation of the scope of its own mandate necessarily conclusive. To be sure the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. But it is not even true that a lower court's interpretation of its mandate is controlling here. Cf. *United States* v. *Morgan*, 307 U. S. 183. Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court.

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of

their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those.[3] To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable was a quarter century ago the opinion of eminent spokesmen of the law.[4] Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judical judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services.[5] These differences in origin and function preclude

[3] See Maitland, The Constitutional History of England, pp. 415-18; Landis, The Administrative Process, *passim*.

[4] See, for instance, the address of Elihu Root as President of the American Bar Association:

"There is one special field of law-development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. . . . There will be no withdrawal from these experiments. . . . We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." 41 A. B. A. Rep. 355, 368-69.

[5] See United States v. Lowden, *ante*, p. —, decided December 4, 1939; Herring, Public Administration and the Public Interest, *passim*.

wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, "should not be too narrowly constrained by technical rules as to the admissibility of proof," *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.[6] Compare *New England Divisions Case*, 261 U. S. 184. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

Under the Radio Act of 1927 as originally passed, the Court of Appeals was authorized in reviewing action of the Radio Commission to "alter or revise the decision appealed from and enter such judgment as to it may seem just." § 16 of the Radio Act of 1927, 44 Stat. 1169. Thereby the Court of Appeals was constituted "a superior and revising agency in the same field" as that in which the Radio Commission acted. *Radio Comm.* v. *General Electric Co.*, 281 U. S. 464, 467. Since the power thus given was administrative rather than judicial, the appellate jurisdiction of this Court

[6] The Communications Commission's Rules of Practice, Rule 106.4, provided that "the Commission will, so far as practicable, endeavor to fix the same date . . . for hearing on all applications which . . . present conflicting claims . . . excepting, however, applications filed after any such application has been designated for hearing." Respondent contends, and the court below seemed to believe that this rule bound the Commission to give respondent a non-comparative consideration because its application had been set down for hearing before the later and rival applications were filed. The Commission interprets this rule simply as governing the order in which applications shall be heard, and not touching upon the order in which they shall be acted upon or the manner in which they shall be considered. That interpretation is binding upon the courts. A. T. & T. Co. v. United States, 299 U. S. 232.

could not be invoked. *Radio Comm.* v. *General Electric Co.*, supra. To lay the basis for review here, Congress amended §16 so as to terminate the administrative oversight of the Court of Appeals. c. 788, 46 Stat. 844. In "sharp contrast with the previous grant of authority" the court was restricted to a purely judicial review. "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 276.

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Fed. Power Comm'n* v. *Pacific Co.*, 307 U. S. 156. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Cf. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364.

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of adinistrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation,

rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted.

It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267, 270. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process.

The judgment is reversed, with directions to dissolve the writ of mandamus and to dismiss respondent's petition.

Reversed.

Mr. Justice McReynolds concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.